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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Clarence Wayne Dixon,

Plaintiff,

vs.

The Arizona Department of Corrections,
Rehabilitation & Reentry (ADCRR);
David Shinn, Director of the Arizona
Department of Corrections,
Rehabilitation & Reentry; James Kimble,
Warden, ASPC – Eyman,

Defendants.

No. CV-22-00743-PHX-DJH (JFM)

DEATH-PENALTY CASE

**OPPOSITION TO MOTION
TO DISMISS AND REPLY IN
SUPPORT OF EMERGENCY
MOTION FOR TEMPORARY
RESTRAINING ORDER OR
PRELIMINARY INJUNCTION
AND MEMORANDUM IN
SUPPORT**

Plaintiff Clarence Wayne Dixon hereby replies to the Motion to Dismiss and Response filed by Defendants.

Defendants' execution protocol prohibits them from using a drug that has a beyond use date ("BUD") that is after the date an execution is carried out. For over a year, Plaintiff has diligently sought information from Defendants regarding the BUD of

1 the drugs intended for use in his May 11, 2022 execution. Defendants continue to
2 withhold the information that would enable Plaintiff to determine whether Defendants
3 will execute him in compliance with their execution protocol. Defendants' own testing
4 document, produced just yesterday, demonstrates that the drugs failed one aspect of
5 testing and vindicates Plaintiff's need for this crucial information.

6 For the reasons explained below, Defendants' Motion to Dismiss, ECF No. 9,
7 should be denied and Plaintiff's Motion for Temporary Restraining Order or Preliminary
8 Injunction, ECF No. 5, should be granted.

9 **I. Plaintiff's Claims are Not Moot**

10 Plaintiff's claims are not moot because Defendants still have not provided him the
11 requested information¹ regarding the specific BUD assigned to the drugs intended for use
12 in his execution. Thus, there has been no "voluntary cessation" of Defendants refusal to
13 provide the information to which Plaintiff is entitled to and a case and controversy still
14 exists. *Spears v. City of Tucson, Arizona*, 125 F. Supp. 3d 903, 909 (D. Ariz. 2015), *aff'd*
15 *sub nom. Spears v. City of Tucson*, 686 F. App'x 492 (9th Cir. 2017).

16 Defendants claim that they have provided "what facially is a BUD." ECF No. 9 at 8.
17 However, Defendants have done no such thing. BUDs must be assigned by the
18 compounder based on the date the drug is compounded and must appear on the
19 compounded drug's label. USP, 22 General Chapter <797> Pharmaceutical
20 Compounding-Sterile Preparations ("USP 23 <797>"), at "Identity and Strength
21 Verification of Ingredients." Defendants' own execution protocol requires that the BUD
22 will provide at minimum a month and a year. *See* Ariz. Dep't of Corr., Rehab. & Reentry,
23 Dep't Order 710-Execution Procedures ("DO 710"), Attachment D at 1.

24
25
26 ¹ Despite Defendants' claim, the information requested by Plaintiff does not in any way
27 threaten the confidentiality of the identity of "executioners and other persons who
28 participate or perform ancillary functions in an execution[.]" A.R.S. § 13-757(C).
Plaintiff, by asking for a specific date that the compounded drug will expire, has not
requested any information that could lead to the discovery of anyone involved with
compounding the drugs because Defendants, as they have done thus far, can redact all
protected information. *See* ECF No. 9 at 8 n.2.

1 Instead, Defendants have produced 11 pages of heavily redacted laboratory tests for
 2 unidentified batches of compounded pentobarbital, none of which provide a date of
 3 compounding or a date of expiry. Defendants have not provided the BUD assigned to the
 4 pentobarbital intended for use in Plaintiff's execution.

5 The "Stability Study Summary Report" that Defendants' rely upon² to claim that they
 6 have provided "what facially is a BUD" in fact provides evidence in support of Plaintiff's
 7 argument that the BUD of the compounded pentobarbital has not been properly extended
 8 beyond 45 days and is therefore expired. *See* ECF No. 5 at 5; Compl. ¶¶ 88-90. The
 9 reference standard cited in the Summary Report for the pH, USP <791>, sets the
 10 acceptable range of pH between 9.0 and 10.5. (Ex. 1.) However, the Summary Report
 11 indicates the pH of the tested pentobarbital is 10.6, meaning the *drug failed this test*
 12 because the results are outside the acceptable range.

13 Unless the BUD of a sterile injectable is extended by a scientifically valid stability
 14 study, the maximum BUD for compounded sterile injectables, like pentobarbital, is 45
 15 days. ECF No. 5-2, Ex. 11, Almgren Report ¶ 10. The information Defendants rely on to
 16 claim they have provided the BUD in fact proves that the BUD has not been properly
 17 extended because it did not pass all components of the stability study and suggests that
 18 the drug intended for Plaintiff's execution is expired. Defendants' own evidence proves
 19 that they have not "irrevocably eradicated the effects of the alleged violation"; instead,
 20 they have further demonstrated Plaintiff's need for the requested information so he can
 21 assess whether Defendants intend to execute him with an expired drug in violation of
 22 their written execution protocol. *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979).
 23 Plaintiff's claims are not moot.

24 **II. Plaintiff Has Stated a Claim under Federal Rule of Civil Procedure 12(b)(6)**

25 Defendants' Motion to Dismiss should be denied because Plaintiff's complaint pleads
 26 "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on
 27 its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). The

28 ² Defendants produced this document, ECF No. 9-1, Ex. 2, to Plaintiff just yesterday
 when they filed their Motion to Dismiss and Response.

1 facts pled in the complaint are more than sufficient to permit this Court “to draw the
2 reasonable inference that the defendant[s] [are] liable for the misconduct alleged.” *Id.*

3 A. Due Process

4 Plaintiff has properly asserted a claim that executing him in violation of
5 Defendants’ protocol, which prohibits the use of an expired drug, will violate his right to
6 due-process and that he is entitled to information regarding the BUD. *See First Amend.*
7 *Coal. of Ariz. v. Ryan*, 938 F.3d 1069, 1080 (9th Cir. 2019) (noting that “inmates may be
8 able to assert a procedural due process right to obtain” information about execution
9 drugs” (citing *Lopez v. Brewer*, 680 F.3d 1068, 1083-84 (9th Cir. 2012) (Berzon, J.,
10 concurring in part and dissenting in part))).

11 The Fourteenth Amendment prohibits a state from depriving “any person of life,
12 liberty, or property, without due process of law.” U.S. Const. amend XIV. This due-
13 process right, “the touchstone” of which “is protection of the individual against arbitrary
14 action of government,” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), requires “the
15 opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v.*
16 *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552
17 (1965)).

18 1. *Defendants have created a liberty interest*

19 Plaintiff’s due process right arises from the liberty interest created by Defendants.
20 Defendants’ written execution protocol prohibits the use of expired drugs and Defendants
21 conceded that specialized testing was necessary to extend the BUD beyond 45 days, in
22 order to comply with that requirement. DO 710, Att. D at 1; Compl. ¶ 33. Defendants
23 confirmed this liberty interest when they conceded that Plaintiff was entitled to
24 information regarding the BUD assigned to the drugs intended for use in his execution.
25 Compl. ¶ 55 (Explaining that Defendants represented to Plaintiff’s counsel by phone that
26 they were “working on producing documents responsive to the request for BUD
27 information and anticipated providing that information to Plaintiff sometime in the next
28 week.”).

1 Defendants cannot execute Plaintiff unless they comply with the terms of the
2 written execution protocol, including conducting the requisite testing necessary to extend
3 the BUD. “[W]hen a State opts to act in a field where its action has significant
4 discretionary elements, it must nonetheless act in accord with the dictates of the
5 Constitution—and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*,
6 469 U.S. 387, 401(1985). Plaintiff has alleged facts, supported by Defendants’ release of
7 the “Stability Summary Study” that suggest the BUD has not properly been extend and
8 Defendants therefore intend to execute him with a drug that will be expired, in violation
9 of the created liberty interest.

10 Defendants do not contradict the fact that ADCRR’s own protocol creates this
11 liberty interest. Instead, they rely on cases from other jurisdictions that did not address
12 the liberty interest that exists here. ECF No. 9 at 6-7. The cases cited by Defendants do
13 not apply to a state-created liberty interest; rather, those cases address—as Defendants
14 explain—a claim relating to state secrecy laws, *Jones v. Comm’r, Ga. Dep’t of Corr.*, 812
15 F.3d 923, 925-26 (11th Cir. 2016)(Marcus, J., concurring in denial of initial hearing en
16 banc); a claim to “discover grievances[,]” *Phillips v. DeWine*, 841 F.3d 405, 420 (6th Cir.
17 2016); and two *Eighth Amendment* claims arguing that the State must disclose its
18 protocol, *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015) (en banc); *Sepulvado v.*
19 *Jindal*, 729 F.3d 413, 418-20 (5th Cir. 2013). Plaintiff has made none of these claims;
20 these cases are inapplicable.

21 In this case, Defendants’ protocol, which prohibits the use of expired drugs, means
22 that Plaintiff’s “interest has real substance and is sufficiently embraced within Fourteenth
23 Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the
24 circumstances and required by the Due Process Clause to insure that the state-created
25 right is not arbitrarily abrogated.” *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

26 2. Defendants will violate Plaintiff’s due- process rights

27 The results disclosed in the “Stability Study Summary Report,” confirm that the
28 BUD could not have been extended by the stability study because the drug failed the pH

1 component. Unless Defendants provide Plaintiff with the BUD assigned to the drug
2 intended for use in his execution and that data demonstrates the drug will not be expired
3 on May 11, 2022, Defendants will deprive Plaintiff of his right to due process by
4 executing him in violation of the protocol.

5 The evaluation of a due-process violation involves an analysis of three factors:
6 “First, the private interest that will be affected by the official action; second, the risk of
7 an erroneous deprivation of such interest through the procedures used, and the probable
8 value, if any, of additional or substitute procedural safeguards; and finally, the
9 Government’s interest, including the function involved and the fiscal and administrative
10 burdens that the additional or substitute procedural requirement would entail.” *Mathews*
11 *v. Eldridge*, 424 U.S. 319, 335 (1976).

12 Plaintiff has a private interest in not being executed in violation of Defendants’
13 execution protocol and the liberty interest created by Defendants. The risk of erroneous
14 deprivation is real—Defendants’ own evidence suggests the drug will be expired.
15 Defendants can safeguard against this violation by providing him with the BUD assigned
16 to the drugs intended for use in his execution and given that Defendants already agreed
17 to provide Plaintiff with this information, the disclosure would not create any additional
18 burden.

19 Evidence suggests that Defendants will violate the execution protocol, in violation
20 of Plaintiff’s right to due process. Defendants have produced no information to the
21 contrary. This deprivation has no relation to any proper governmental purpose because
22 Defendants’ actions should already be limited by their own written procedures.

23 **III. Plaintiff has met the standard for a preliminary injunction**

24 Plaintiff has met the standard for a preliminary injunction because (1) he is likely
25 to succeed on the merits of his due process claim, (2) he is likely to suffer irreparable
26 harm in the absence of preliminary relief, (3) the balance of equities tip in his favor, and
27 (4) a preliminary injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20
28 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

1 A. Plaintiff is likely to succeed on the merits

2 For the reasons discussed above, Plaintiff is also likely to succeed on the merits of his
3 due process claim. Once the state creates a liberty interest, which Defendants' execution
4 protocol and specialized testing requirement have done, that interest must be honored.
5 Defendants affirmed that right when they conceded Plaintiff was entitled to information
6 about the drug's expiry. Compl. at ¶ 55. Defendants refusal to provide him the BUD
7 assigned to the drug intended for use in his execution in the face of evidence that
8 demonstrates the BUD has not been properly extended, violates his right to due process.

9 B. Plaintiff Will Suffer Irreparable Harm

10 Irreparable harm exists where there is no adequate legal remedy to cure the harm. *See*
11 *Ariz. Recovery Housing Ass'n v. Ariz. Dep't of Health Servs.*, 462 F. Supp. 3d 990, 997
12 (D. Ariz. 2020). Here, the harm is irreparable: no other remedy is currently available to
13 Plaintiff and no remedy will be available to him once he is dead.

14 Plaintiff has raised colorable claims of threatened constitutional violations that
15 establish harm as a matter of law. The Ninth Circuit has made clear that "[a]n alleged
16 constitutional infringement will often alone constitute irreparable harm." *Goldie's*
17 *Bookstore, Inc. v. Super. Ct. of Calif.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also, e.g.,*
18 *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) ("When an alleged
19 deprivation of a constitutional right is involved, most courts hold that no further showing
20 of irreparable injury is necessary." (quoting 11A *Charles Alan Wright, Arthur R. Miller*
21 *& Mary Kay Kane*, Federal Practice and Procedure, § 2948.1 (2d ed. 2004))). Plaintiff
22 has also demonstrated that he will suffer irreparable harm as a matter of fact if Defendants
23 are permitted to go forward with his execution in violation of his right to due process and
24 his First Amendment rights.

25 Plaintiff's assertions are not speculative; he has "demonstrate[d] immediate
26 threatened injury[.]" *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th
27 Cir. 1988). The facts pled in the complaint and Defendants' own newly produced
28 evidence, the "Stability Study Summary Report," establish that the BUD cannot be

1 extended because the drugs did not pass the stability study and indicate, therefore, that
2 the drugs intended for use in Plaintiff's execution will be expired on May 11, 2022.³ If
3 Defendants are permitted to execute Plaintiff without demonstrating that the drug has a
4 BUD past this date, Plaintiff will suffer irreparable harm.

5 C. The Balance of Equities and Public Interest Support a Preliminary Injunction

6 The third and fourth preliminary injunction factors, the balance of the equities and
7 public interest factors, also weigh in Plaintiff's favor and are properly considered together
8 here. "When the government is a party, these last two factors merge." *Drakes Bay Oyster*
9 *Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

10 As detailed in the complaint, Plaintiff has not been dilatory and has acted
11 reasonably and in good faith. *See* Compl. ¶¶ 45-54. Plaintiff has been seeking information
12 regarding Defendants' supply of pentobarbital since March 2021 and most recently asked
13 for the specific BUD on April 14, 2022, after Defendants produced several documents
14 that failed to provide the requested information. *Id.*

15 The only delay here exists on the part of Defendants, who have refused to provide
16 the BUD and have slowly trickled out responses to Plaintiff's timely requests. Just
17 yesterday (May 5, 2022), Defendants provided another document—the "Stability Study
18 Summary Report"—that they erroneously claim "facially" provides a BUD. The final
19 test listed on this report, the one in which the drugs failed to pass, was conducted on
20 March 28, 2022, *nearly six weeks ago*. Instead of timely producing documents in
21 response to Plaintiff's requests, Defendants have delayed, including most recently on
22 April 22, 2022 when they informed Plaintiff by phone that they anticipated providing
23 information related to the BUD information sometime during the next week. Compl. ¶
24 55. Plaintiff filed his complaint after Defendants did not produce the BUD information
25 within their own timeframe. Any delay is the fault of Defendants and the balance of
26 equities tip in Plaintiff's favor.

27
28 ³ Indeed, Defendants' inability to provide a legitimate BUD indicates that the drugs may
have expired last month, on or around April 18, 2022.

1 Similarly, the public interest favors Plaintiff. “It is always in the public interest to
2 prevent the violation of a party’s constitutional rights.” *Cal. Chamber of Com. v. Council*
3 *for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022) (alterations and internal
4 quotation marks omitted). Plaintiff has pled facts that demonstrate threatened
5 constitutional violations; Defendants’ most recent disclosure, which suggests the drugs
6 intended for use in his execution are expired, adds support to his claims. The public
7 interest would be served through the grant of preliminary relief because “all citizens have
8 a stake in upholding the Constitution” and have “concerns [that] are implicated when a
9 constitutional right has been violated.” *Preminger v. Principi*, 422 F.3d 815, 826 (9th
10 Cir. 2005).

11 Defendants’ Motion to Dismiss should be denied because Plaintiff has stated a
12 claim under Rule 12(b)(6). Plaintiff’s Motion for a TRO or Preliminary Injunction should
13 be granted because he has demonstrated a likelihood of success on the merits, and
14 because the other factors tip in his favor.

15 Respectfully submitted this 6th day of May, 2022.

16 Jon M. Sands
17 Federal Public Defender
18 District of Arizona

19 Jennifer M. Moreno
20 Therese M. Day
21 Amanda C. Bass
22 Assistant Federal Public Defenders

23 s/ Jennifer M. Moreno
24 Counsel for Plaintiff
25
26
27
28

Certificate of Service

I hereby certify that on May 6, 2022, I electronically filed the foregoing Opposition to Motion to Dismiss and Reply in Support of Emergency Motion for Temporary Restraining Order or Preliminary Injunction and Memorandum in Support with the Clerk's Office using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Kat Esparza
Assistant Paralegal
Capital Habeas Unit

EXHIBIT 1

U.S. PHARMACOPEIA

Search USP29

Go

Pentobarbital Sodium Injection

» Pentobarbital Sodium Injection is a sterile solution of Pentobarbital Sodium in a suitable solvent. Pentobarbital may be substituted for the equivalent amount of Pentobarbital Sodium, for adjustment of the pH. The Injection contains the equivalent of not less than 92.0 percent and not more than 108.0 percent of the labeled amount of $C_{11}H_{17}N_2NaO_3$.

Packaging and storage— Preserve in single-dose or multiple-dose containers, preferably of Type I glass. The Injection may be packaged in 50-mL containers.

Labeling— The label indicates that the Injection is not to be used if it contains a precipitate.

USP Reference standards [〈 11 〉](#) — [USP Endotoxin RS](#). [USP Pentobarbital RS](#).

Identification— The residue obtained in the [Assay](#) responds to [Identification](#) test A under [Pentobarbital Sodium](#).

Bacterial endotoxins [〈 85 〉](#) — It contains not more than 0.8 USP Endotoxin Unit per mg of pentobarbital sodium.

pH [〈 791 〉](#) : between 9.0 and 10.5.

Residual solvents [〈 467 〉](#) : meets the requirements.

(Official January 1, 2007)

Other requirements— It meets the requirements under [Injections](#) [〈 1 〉](#).

Assay— Pipet a volume of Injection, equivalent to about 500 mg of pentobarbital sodium, into a separator, and dilute with water to about 15 mL. To the solution add 2 mL of hydrochloric acid, shake, and completely extract the liberated pentobarbital with 25-mL portions of chloroform. Test for completeness of extraction by extracting with an additional 10-mL portion of chloroform and evaporating the solvent: not more than 0.5 mg of residue remains. Filter each extract through a pledget of chloroform-washed cotton, or other suitable filter, into a tared beaker, and finally wash the separator and the filter with several small portions of chloroform. Evaporate the combined filtrate and washings on a steam bath with the aid of a current of air, add 10 mL of ether, again evaporate, dry the residue at 105° for 2 hours, cool, and weigh. The weight of the residue, multiplied by 1.097, represents the weight of pentobarbital sodium ($C_{11}H_{17}N_2NaO_3$).

Auxiliary Information— *Staff Liaison* : [Ravi Ravichandran, Ph.D., Senior Scientist](#)

Expert Committee : (MDPP05) Monograph Development-Psychiatrics and Psychoactives

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